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In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD H. KIMMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Bollenbach v. *United States*, 326 U.S. 607 6

Francis v. *Franklin*, No. 83-1590 (Apr. 29, 1985) 2, 3, 4

Henderson v. *Kibbe*, 431 U.S. 145 4

Sandstrom v. *Montana*, 442 U.S. 510 ..... 2, 3

United States v. *Caucci*, 635 F.2d 441, cert. denied, 454 U.S. 831 4

United States v. *Frady*, 456 U.S. 152 5

United States v. *Johnson*, 756 F.2d 453 3-4

United States v. *Love*, 767 F.2d 1052, cert. denied, No. 85-526 (Jan. 21, 1986) 3

United States v. *Park*, 421 U.S. 658 4

United States v. *Young*, No. 83-469 (Feb. 20, 1985) 5

Statute:

18 U.S.C. 1341 1

Miscellaneous:

1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instruction* (3d ed. 1977) 3

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Petitioner contends that the jury instructions contained an impermissible mandatory presumption concerning intent and that the district court committed plain error in refusing to resolve a question submitted by the jury during its deliberations.

1. Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on 23 counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to a total of six years' imprisonment. The court of appeals affirmed (Pet. App. A1-A10; 777 F.2d 290).

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[1]Petitioner was acquitted on one count charging him with obstruction of justice.

The evidence adduced at trial, the sufficiency of which is not in dispute, is summarized in the court of appeals' opinion (Pet. App. A2). Briefly, it showed that in 1976 petitioner purchased Medart, Inc., a manufacturing company in Greenwood, Mississippi, and contracted with ITT Commercial Finance Corporation to finance the purchase. The amounts ITT was to lend to petitioner were based on a percentage of Medart's accounts receivables. Petitioner was obligated to report Medart's receivables to ITT and to assign all receivables to ITT in return for the loan. Between January and April 1980, petitioner submitted a series of false receivables reports to ITT. The false reports omitted a total of more than $660,000 in payments, which petitioner had diverted to other uses (*ibid.*).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court appeals. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

a. Petitioner contends (Pet. 8-15; Pet. Supp. Br. 2-6) that one of the district court's instructions on intent was invalid under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), because it contained a mandatory presumption that shifted the burden of proof from the government to him.[2] That claim lacks merit.

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[2]The challenged instruction was as follows (Pet. App. A3; 10/17/84 Tr. 13-14):

> As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent.

The district court's instruction referred to a permissible inference, not a mandatory presumption. It was therefore materially different from the ones given in *Sandstrom* and *Francis*. In *Sandstrom*, the court's instruction said that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" (442 U.S. at 515). Similarly, the instructions in *Francis* stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of a person's will" and that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted" (slip op. 7). In each case, the instruction created the risk that it could have been understood by the jury as a direction to presume an essential element of the charged offense. By contrast, the standard jury instruction that was given here told the jury only that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.13 (3d ed. 1977). The instruction did not tell the jury that it must draw that inference; on the contrary, the instruction expressly told the jury that it "may draw the inference" (Pet. App. A3). Accordingly, as the court of appeals correctly noted, the instruction given here "differs sharply" from the ones in *Sandstrom* and *Francis* because "the trial court never directed the jury to infer [petitioner's] intent" (Pet. App. A4). Moreover, the instruction given here also differed from those given in *Sandstrom* and *Francis* in that here the inference was to be drawn only from petitioner's "knowing" acts (*id.* at 3). The instruction given in this case therefore was not erroneous. See, *e.g.*, *United States* v. *Love*, 767 F.2d 1052, 1059-1060 (4th Cir. 1985), cert. denied, No. 85-526 (Jan. 21, 1986); *United States* v.

Johnson, 756 F.2d 453,454-455 (6th Cir. 1985); *United States* v. *Caucci*, 635 F.2d 441,447 (5th Cir.), cert. denied, 454 U.S. 831 (1981).[3]

Petitioner claims (Pet. 10) that the instruction contained a mandatory presumption because his intent was the only contested issue at trial. That argument lacks any force. Whether intent was a disputed issue at a trial is relevant to the question whether an erroneous instruction prejudiced the defendant, but it is wholly irrelevant to the question whether there was an error in the first place.[4]

b. There is also no merit to petitioner's claim (Pet. 15-16) that the district court's answer to a question submitted by the jury during its deliberations constituted plain error. During its deliberations, the jury submitted the following question to the district court (Pet. App. A6; 10/17/84 Tr. 34):

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[3]Furthermore, a single jury instruction may not be considered in isolation, but must be viewed in the context of the entire jury charge and the record of the trial, because the charge as a whole may clarify an ambiguous instruction or, by correctly stating the law, dissipate any prejudicial effect resulting from a single erroneous instruction. See, *e.g.*, *Francis*, slip op. 11; *Henderson* v. *Kibbe*, 431 U.S. 145, 152-156 (1977); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). Here, the district court instructed the jury that the government had the burden of proving petitioners' guilt beyond a reasonable doubt (10/17/84 Tr. 6-7, 10, 11, 14, 17, 18, 19, 20), that the jury was entitled to draw reasonable inferences from the evidence adduced in court (*id.* at 4, 19), and that the jury must consider the charge as a whole (*id.* at 2). The jury therefore could not have been confused on this issue.

[4]Petitioner erroneously asserts (Pet. 10-13; Pet. Supp. Br. 2-6) that the decision below conflicts with other courts of appeals' decisions disapproving similar instructions. In fact, however, each of the cases cited by petitioner involved instructions that contained a mandatory conclusive or rebuttable presumption or that shifted the burden of proof to the defendant. There is also no need to hold this case pending the Court's resolution of *Rose* v. *Clark*, No. 84-1974 (argued Mar. 24, 1986). The issue in *Rose* is whether an erroneous presumption in jury instructions can be harmless; the instructions here contained no presumption.

> If the party, ITT, does not live up to certain parts of the contract, withholding nine hundred thousand dollars credit and cutting money returned to fifty percent, would this relieve Medart of the obligation of sending all receivables to ITT?

After consulting with counsel for the government and the defense, the court responded as follows (*id.* at A6-A7; 10/17/84 Tr. 34):

> That is a question of fact, which you must answer from the testimony that you have heard. It is not a question that the court can answer. That is your obligation, your responsibility, and your area, not mine, to answer that question. You take that answer from the testimony you have heard, that has been presented to you.

Defense counsel did not object at trial to this supplemental instruction (*ibid.*; *id.* at 36-38). Petitioner therefore cannot prevail unless the district court's action amounted to a miscarriage of justice. See *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15; *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

The issue presented by the jury's question was whether petitioner's actions were justified on the ground that the victim of his scheme had allegely breached its contracts with Medart. The only possible relevance of that inquiry in the context of this case would be to petitioner's good faith in believing that he was entitled to make misrepresentations to ITT because of ITT's own breach of its obligations to Medart.[5] And, as the court of appeals noted (Pet. App. A7),

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[5]The court could properly have instructed the jury that its question was irrelevant, since even if Medart was not obligated to send all its receivables to ITT, petitioner was not thereby entitled to deceive ITT by misrepresenting the status of the receivables account. Such an instruction obviously would have been more unfavorable to petitioner than the instruction that the court actually gave.

"[t]he trial court's original charge clearly and thoroughly apprised the jury of its responsibilities" in connection with petitioner's good faith defense.[6] Petitioner does not argue to the contrary. In these circumstances, there was no error, let alone plain error, in the district court's refusal to instruct the jury further on that point.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[6]The court gave the following instructions with regard to petitioner's good faith defense (Pet. App. A4-A5 n.1; 10/17/84 Tr. 15-16):

> The court further instructs the jury that good faith is a defense to mail fraud. Therefore, if you believe from the evidence that the submittals containing incorrect information were sent to ITT for the purpose of enabling Medart to obtain from ITT money which the defendant had reasonable grounds for believing and did believe that Medart was entitled by contract to receive from ITT and were not sent to ITT for the purpose of defrauding ITT, then it would be your duty to find the defendant not guilty of the charges made in Counts 1 through 23.
>
> However, a fraudulent misrepresentation or fraudulent representation may be accomplished by conduct, by acts as well as by words, by silence when there is a duty to speak, by halftruths calculated to mislead, or by statements made with a reckless indifference as to whether they are true or false. Thus the defense claim of good faith, while relevant to innocence, would not justify false or reckless representations and promises made by a Defendant.

[7]Petitioner's reliance (Pet. 15, 17) on *Bollenbach* v. *United States*, 326 U.S. 607 (1946), is misplaced. In that case, the district court's answer to a jury question contained an erroneous presumption which, the facts graphically revealed, clearly prejudiced the defendant. *Id.* at 609-610.

DOJ-1986-04